



CONSTITUTIONAL LAW

- Final Judgment cannot be challenged by an inquiry under s 84 except by a separate application against the Attorney general if it is alleged to be a contravention of Chapter 5 Rights and Freedoms
- MAHARAJ II and a series of local decisions on the point cited
- Proceedings not pending where Appeal heard and Rule 10(a) of the repealed Constitutional Rules would not apply

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Civil Appeal 60 of 2000

KENYA BREWERIES LIMITED APPELLANT

VERSUS

PAULINE WAIRIMU NJUGUNA RESPONDENT

RULING

By a Notice of Motion filed on 25th August 2003 the Respondent/Applicant sought the following orders:

- (1) An order that the Appellant's refusal, failure and/or neglect to fix the above appeal for hearing has occasioned a breach of the fundamental right of the Applicant to a fair hearing within a reasonable time as is provided for in s 77(9) of the Constitution of Kenya
- (2) An order that the refusal, failure and/or neglect of the Appellant to provide the Applicant with medical provision and facilities as the Appellant was doing doing the Applicant's service of employment with it, has breached the Applicant's right to life as guaranteed by section 71(1) of the Constitution of Kenya
- (3) An Order that the said refusal, failure and/or neglect of the Applicant has also breached the Applicant's fundamental right not to be subjected to torture or inhuman or degrading punishment or other treatment as guaranteed by Section 74 of the Constitution of Kenya.

The Applicant sought directions as per her application filed on 27th July 2005. Before directions could be given the Applicant's Counsel who had filed an earlier Notice of Preliminary Objection urged the court to have the objection dispose of first and the Applicant's Counsel agreed to it.

The Notice of Preliminary objection was filed on 7th October, 2003.

The objections raised are:

- (1) Judgment was entered in this matter on 17th June, 1998
- (2) The current Advocates purporting to be on record on behalf of the Respondent namely Gitobu Imanyara & Company Advocates filed their Notice of Change of Advocates on 25th August 2003 long after the said judgment
- (3) No Application was filed by the said Advocates seeking the court's leave to place themselves on record ad no such court order has been obtained
- (4) The Advocates have therefore failed to comply with the mandatory provisions of O III rule 9A of the Civil Procedure Rules
- (5) The said Advocates have therefore failed to comply with the mandatory provision of Order III Rule 7 of the Civil Procedure Rules requiring them to serve the Applicants provision Advocates with a Notice of Change of Advocates.

In addition to the above the Appellant's Counsel has raised the following arguments in her written skeleton arguments filed on 3rd March 2006:

1. There is "no suit" on which to "peg" the constitutional matter
2. The court herein is "functus officio"
3. The constitutional reference is bad in law
4. No leave of the Court has been granted to the Applicant to come on record pursuant to the law
5. Further grounds to be adduced at the hearing.
 - I. The Appellant has filed a list of authorities together with a bundle dated 7th February 2006
 - II. The Appellant states that the Notice of Motion was filed while the Appeal was pending
 - III. The Application is based on lack of hearing which was never an issue in the appeal itself
 - IV. That Constitutional reference stands on their own
 - V. Under S 84 court has to make an inquiry where violation is alleged
 - VI. There is no need to file a separate application after the disposal of the appeal

The Court has considered the above arguments and would at the outset observe that the application was based on Rule 10(a)(b) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual Rules 2001). I find it useful to set out this Rule in extenso:

'(10(9) Where contravention of fundamental rights and freedoms is alleged in any proceedings pending in the High Court application for determination of the question shall be made by Notice of Motion in the matter and in that case the provisions of Order L of the Civil Procedure Rules shall, as far as is practicable, apply

(h) Pending the determination of such question all further proceedings shall be stayed."

It is common ground between the parties that the appeal which was then pending has been finalised by the Lordship Justice Visram before the Notice of Motion could be dealt with and he has given a final judgment. The appeal having been finalised this renders the Notice of Motion which inter alia raised issues concerning the speed of its hearing, superfluous. It is not the fault of the court that the Appellant engaged two firms who could not properly co-ordinate the hearing of the said Notice of Motion and the Appeal so as to ensure that the proceedings in the appeal are stayed as per the rules. Moreover a final judgment by a judge of co-ordinate jurisdiction is as final and as constitutional as anything can be. The original jurisdiction envisaged under S 84 although not concurrent, can only be invoked if any order or ruling is challenged as a violation of any of the Chapter 5 rights and freedoms. This is not what is alleged here. A court cannot disregard the Constitution – see S 3 of the Judicature Act.

For the two reasons there is nothing for me to hear.

As the judge who gave the final judgment is immune from challenge see S 6 of the Judicature Act the only available avenue for any challenge would be to file an appeal to the Court of Appeal against the judgment and if a constitutional challenge is still contemplated after a final judgment a separate constitutional application must be filed under S 84 against the Attorney General – see **MAHARAJ II – TRINDAD & TOBAGO Misc Civil Application No. 258 of 2002.**

R v CHIEF JUSTICE ex parte Nambuye Misc Civil Application No. 764 of 2004.

R v ATTORNEY GENERAL ex parte J KINYANJUI Misc Civil Application No. 1176 of 2004.

I do not consider the other cited cases relevant to the issue before me.

In the light of the above I do not find it necessary to go into any other issue. I uphold the objection and strike out the Notice of Motion with costs to the Appellant/Respondent

DATED and delivered at Nairobi this 9th day of March 2007.

J.G. NYAMU

JUDGE